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In the Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, ET AL., APPELLANTS

v.

COMMUNICATIONS WORKERS OF AMERICA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

This memorandum is submitted in support of the jurisdictional statement filed in this case by certain agencies of the State of Colorado. The State has presented to this Court the following question (J.S. 4-5):

> Does federal law preempt a state law which requires a secret ballot election to determine a collective bargaining unit as a condition precedent to the employee representative entering into a union security agreement when the National Labor Relations Board previously certified or recognized the appropriate collective bargaining unit for the employees involved?[1]

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[1] A companion case, raising this and other questions, is also pending before the Court. *Communications Workers of America* v. *Western Electric Company, et al.*, No. 76-459.

STATEMENT

The Communications Workers of America ("the Union") entered into collective bargaining agreements in 1968 and 1971 with Western Electric Company and the Mountain States Telephone & Telegraph Company, covering employees in multi-state bargaining units previously approved by the National Labor Relations Board (J.S. 58, 76). All of these contracts contained union security clauses requiring employees to pay the Union, as a condition of continued employment, amounts equal to periodic union dues.[2] During the terms of the 1968 contracts, certain Colorado-based employees covered by the union security provisions of the contracts ceased making payments to the Union, and the Union requested their discharge (J.S. 21-22). However, both Western Electric and Mountain States refused to discharge the employees on the ground that the union security arrangements had not been approved by at least three-fourths of the unit employees

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[2]The Union's two 1968 agreements with Mountain States covered separate multi-state bargaining units of plant department and traffic department employees, and required each employee who was a member of the Union on a certain date to pay to the Union an amount equal to the periodic dues as a condition of continued employment (J.S. 18-20). The Union also had two 1968 agreements with Western Electric which covered nation-wide bargaining units of certain communications equipment workers and job clerks, and which contained modified-maintenance-of-membership clauses substantially identical to those in the 1968 Mountain States agreements (J.S. 15-17).

In 1971, the Union entered into an agreement with Mountain States covering a company-wide bargaining unit which combined plant department and traffic department employees and contained a modified-agency-shop provision requiring Union members and newly hired employees, 30 days after hire, to pay the Union "amounts equal to the periodic dues applicable to members" as a condition of continued employment (J.S. 26-28). The two 1971 agreements between Western Electric and the Union covered the same units as their 1968 agreements and established union security arrangements like those in the 1971 Mountain States contract (J.S. 23-26).

based in Colorado in a referendum conducted by the Colorado Industrial Commission, as required by the Colorado Labor Peace Act, C.R.S. 1973 Section 80-4-1 *et seq.* (now Section 8-3-101 *et seq.*) (J.S. 21, 22-23).[3] Following execution of the three 1971 agreements, both Western Electric and Mountain States continued to refuse to apply the union security provisions in the contracts to their Colorado employees (J.S. 28).

Thereafter, the Union brought suit in Colorado district court, seeking a declaratory judgment that the Labor Peace Act did not cover the union security arrangements contained in the 1968 and 1971 contracts. Alternatively, the Union requested a declaration that, if state law did apply to those arrangements, they were nevertheless lawful because the state's method of regulation was "invalid on grounds of federal preemption" (J.S. 72, 77).

The Colorado district court construed the Labor Peace Act to apply to the union security provisions in the contracts. It further found that federal law did not preempt Colorado from conditioning the validity of union security agreements within the state upon an "all-union" referendum among bargaining unit employees (J.S. 13-53).

The Colorado Supreme Court, sitting *en banc*, affirmed the district court over the dissent of Chief Justice Pringle (J.S. 55-86). The Colorado Supreme Court held that, under Section 14(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 164(b), and *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, Colorado was empowered to

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[3]The pertinent provisions of the Colorado Labor Peace Act are set forth at J.S. 3-4.

regulate union security agreements negotiated with employers subject to the NLRA (J.S. 80-84). The court further held that (J.S. 76-77)—

> [a] secret ballot election, as described by section 80-4-2(6) [8-3-104(4)], is the exclusive method by which a collective bargaining unit subject to the "all-union" referendum provisions of section 80-4-6(1)(d) [8-3-104(1)] may be recognized. Correlatively, we hold that a collective bargaining unit, as defined by section 80-4-2(6) [8-3-104(4)], is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. Inasmuch as no secret ballot election was conducted for the purpose of establishing a collective bargaining unit authorized to enter into an all-union agreement with Mountain States and Western Electric, [the Union] is not entitled to the enforcement of the all-union agreements provisions which are, in our opinion, invalid. Even if such an election had been held and an appropriately authorized collective bargaining unit had been established, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum.

Chief Justice Pringle concluded in dissent that while Section 14(b) of the NLRA permits states to prohibit union security arrangements, it does not authorize state regulation of such arrangements in the manner approved by the majority (J.S. 85-86). In his view, any other reading of Section 14(b) could result in "50 different standards as to how and when union and agency shops might be negotiated" (J.S. 85).

DISCUSSION

Section 9(b) of the NLRA, 29 U.S.C. 159(b), confers upon the National Labor Relations Board jurisdiction to determine, in cases involving representation of the employees of employers whose operations affect commerce within the meaning of the Act, whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." It is settled that Congress intended this jurisdiction to be exclusive. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18; *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767. The Colorado Supreme Court has held in the present case that a state may superimpose a state-determined collective bargaining unit upon a Board-recognized unit, incidental to exercising the power over union security agreements conferred upon it under Section 14(b) of the NLRA. The Board believes that the Colorado Supreme Court's holding is erroneous and that prompt corrective action by this Court is warranted.

1. Section 14(b) of the NLRA, with obvious reference to Section 8(a)(3), 29 U.S.C. 158(a)(3), declares that "[n]othing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Thus, Congress has permitted a state, if it desires, to enact more comprehensive restrictions on union-security arrangements than those contained in the first proviso to Section 8(a)(3).

In *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board, supra*, this Court construed Section 14(b) as permitting a state not merely to "prohibit" union security arrangements, but also to "regu-

late" them more stringently than does the NLRA. Specifically, this Court held in *Algoma* that the State of Wisconsin could prevent an employer, engaged in commerce within the meaning of the NLRA, from discharging an employee under a union security agreement which, although valid under federal law, had not been authorized by the referendum required by state law.[4] The Court further held that Wisconsin could remedy this unlawful action by ordering the employer to cease giving effect to the union security agreement and to reinstate the employee with back pay.

2. In light of the foregoing, it would appear that, insofar as the Colorado Labor Peace Act conditions the validity of a union security agreement covering employees working in Colorado upon approval by at least three-quarters of the employees voting in an "all-union" referendum conducted by the State, such condition is not barred by the NLRA—even though the operations of the employer affect commerce within the meaning of the Act and thus are subject to the Board's jurisdiction. However, the Colorado Supreme Court has interpreted the Labor Peace Act as precluding the State, even when a bargaining unit approved or certified by the Board already exists, from holding such referendum in that unit, or among the Colorado workers in that unit (where,

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[4]The Wisconsin statute at issue in *Algoma* defined as an unfair labor practice discrimination with regard to employment by any employer for the purpose of encouraging membership in a labor organization. But the statute also provided that (see 336 U.S. at 303-304)—

> an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds of such employes voting * * * shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the [Wisconsin Employment Relations Board]. * * *

as here, the unit is a multi-state unit). Rather, it has held that, irrespective of the existence of a unit approved by the Board, the State is required, as a condition precedent to an all-union referendum election, to conduct a separate election by secret ballot to determine a collective bargaining unit under the provisions of the Labor Peace Act. We agree with the State that this requirement, which constitutes a departure from the State's past practice,[5] presents such danger of conflict with, and impairment of, the Board's unit determination that it cannot stand.

a. Under the NLRA, the Board determines whether the unit appropriate for collective bargaining purposes shall be "the employer unit, craft unit, plant unit, or subdivision thereof" (Section 9(b), 29 U.S.C. 159(b)). Under the Labor Peace Act, that responsibility rests with the employees themselves: that is, the Labor Peace Act requires the director of the Colorado Industrial Commission to include "on any ballot for the selection of a bargaining unit the names or suitable description of each bargaining unit submitted to the director and claimed to be the appropriate unit by an employee or group of employees participating in the election" (C.R.S. 1973 Section 8-3-107(3)). Depending upon the wishes of a majority of the employees, the "collective bargaining unit" under Colorado law may consist of "the employees of one employer employed

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[5] As the State pointed out (J.S. 7):

> Prior to this decision, the state agency conducted unit certification elections only for those units which were not within the jurisdiction of the National Labor Relations Act. The state did not construe the act as requiring a state unit certification election, as a prerequisite to an all-union agreement referendum, for units which previously had been certified or recognized by the National Labor Relations Board.

within the state," or "a single craft, division, department, or plant" of that employer (C.R.S. 1973 Section 8-3-104(4)).

In these circumstances, it is not unlikely that the Colorado employees of an employer for whom the Board has already established a bargaining unit would, in a Colorado collective bargaining unit election, vote for a unit or units which are vastly different from the unit created or approved by the Board. For example, in the case of a multi-state, company-wide Board unit, as here, Colorado employees could select under state law a variety of units in addition to or inconsistent with the unit approved by the Board: a plant-wide unit at one plant, a craft-wide unit at a second plant, and no unit at a third plant.[6] The likelihood of such variation is enhanced by the view of the Colorado Supreme Court that there is "a strong policy in the Labor Peace Act in favor of fractional representation of the employees of one employer." *Dry Cleaners and Laundry Workers Local Union No. 304* v. *Sunnyside Cleaners and Shirt Laundry,* 146 Colo. 31, 360 P. 2d 446, 449.

b. Although the Colorado Supreme Court has suggested that the unit election mandated by state law as a precondition for holding an all-union referendum need not serve to determine the unit appropriate for bargaining

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[6]It is also possible that the state units would include individuals who are not included in the Board unit. The state director is empowered to "determine which persons shall be qualified and entitled to vote at any election held by him" (C.R.S. 1973 Section 8-3-107(5)). Contrary to Section 9(b)(3) of the NLRA, 29 U.S.C. 159(b)(3), the Labor Peace Act does not preclude the inclusion of plant guards in the same unit with other employees. And, while the Labor Peace Act appears to exclude supervisors from the definition of "employee" (C.R.S. 1973 Section 8-3-104(11)(a)), it does not contain a definition of "supervisor" comparable to that in Section 2(11) of the NLRA, 29 U.S.C. 152(11).

purposes,[7] the Labor Peace Act provides otherwise. C.R.S. 1973 Section 8-3-104(4). And, if the state's unit election does serve, in fact, to determine a bargaining representative, such result would be inconsistent with this Court's decisions in *La Crosse* and *Bethlehem, supra,* which held that there cannot be two representatives or two bargaining units for the same employees.[8]

c. Moreover, even accepting the view of the Colorado Supreme Court that the unit election contemplated by it would serve merely to determine the unit in which to hold a referendum concerning the issue of union security, the likely interference with the Board's unit determination

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[7]The court stated (J.S. 81-82):

> The issue of a state's power to recognize or certify collective bargaining units must not be confused with the state's power to regulate union security agreement. * * * In Colorado, a "collective bargaining unit" for purposes of the union security agreement provision of the Colorado Labor Peace Act, may be something different than a collective bargaining unit for other purposes of labor-management relations. * * * Viewed as such, the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in § 14(b) of the Taft-Hartley Act. The application of section 80-4-2(6) [8-3-104(4)] to the union security provisions of the Colorado Labor Peace Act is severable from its application in other contexts of the Act.

[8]As the Court stated in *Bethlehem, supra,* 330 U.S. at 776:

> If the two [state and federal] boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other * * * . The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. * * * We do not believe this leaves room for the operation of the state authority asserted.

still would be substantial. A union which has been designated by the Board as the representative of a particular unit of employees would find it difficult, if not impossible, to negotiate a collective bargaining agreement for the unit if the issue of union security for Colorado-based workers depended upon the outcome of elections conducted in a variety of unpredictable units which differed from the unit approved by the Board—and perhaps even included employees not included in the Board unit.[9] The potential for interference with the union's representative function in the Board unit would be far greater in such circumstances than if the State limited the union security referendum to the Board unit or to the Colorado-based workers in that unit (where, as here, the Board unit is multi-state).[10] Cf. *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 285-286.

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[9]If the Colorado unit included individuals not in the Board unit, it is possible that a union security provision could be rejected as the result of the vote of individuals whom the union, insofar as the NLRA was concerned, did not represent. On the other hand, should a union security provision be approved in such unit, the union would be compelled, insofar as state law was concerned, to represent those individuals in negotiations over union security. Cf. C.R.S. 1973 Section 8-3-108(1)(c) ("[t]he director shall declare any such all-union agreement terminated whenever he finds that the labor organization involved unreasonably has refused to receive as a member any employee of such employer").

[10]Where the unit approved or certified by the Board for representation purposes covers employees working in more than one state, and some of those states restrict union security arrangements more stringently than does the NLRA, it is necessary, in order to give effect to the privilege accorded the states under Section 14(b) of the NLRA, to create a union security unit that is smaller than the Board representation unit. But in contrast to the units mandated by the decision below, such a modified unit is not independent of the unit approved by the Board for representation purposes, and it does not include any employees not included in the representation unit.

d. Finally, to permit the State to establish units different from those approved by the Board creates the possibility that unions and employers will be faced with the Hobson's choice of either violating the NLRA by applying a union security agreement that complies with Colorado law or violating Colorado law by applying a union security agreement that complies with the NLRA. The first proviso to Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), permits the discharge of an employee for failure to pay union dues as required by a union security agreement only "if [the union] is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made * * * ." Accordingly, an employer would violate Section 8(a)(3), and a union Section 8(b)(2), 29 U.S.C. 158(b)(2), of the NLRA by enforcing a union security agreement covering a bargaining unit other than that approved by the Board under Section 9 of the Act. Such violation is particularly likely to occur when the agreement covers a unit that is clearly inappropriate under the NLRA because it contains individuals, such as supervisors, who are statutorily excluded from Section 9 units. See, *e.g., St. Luke's Hospital Center,* 221 N.L.R.B. No. 217, 91 L.R.R.M. 1150.[11] On the other hand, should an employer or union attempt to apply a union security arrangement covering the Board-approved unit, rather than the state-approved union security unit, they would, under the decision below, violate the Labor Peace Act (see C.R.S. 1973 Section 8-3-108(1)(c), (2)(b)).

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[11]Enforced *sub nom. National Labor Relations Board* v. *St. Luke's Hospital Center,* C.A. 2, No. 76-4088 (decided December 29, 1976).

CONCLUSION

For the foregoing reasons, probable jurisdiction of the State's appeal should be noted and the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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